MOTION FILED
NOV 21 2001

(3)

No. 01-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,
Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE and BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MARK N. BRAVIN
Counsel of Record
PETER BUSCEMI
DAVID R. LIPSON
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, NW
Washington, DC 20036
(202) 467-7231
Attorneys for the Government of the United Kingdom of Great Britain and Northern Ireland

November 21, 2001

31 pp

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to this Court's Rule 37, the Government of the United Kingdom of Great Britain and Northern Ireland, through its undersigned counsel, hereby respectfully moves for leave to file the following brief *amicus curiae* in support of the petition for certiorari in this case. Petitioner has consented to the United Kingdom's filing its brief, and a letter reflecting that consent is being filed with the Clerk of the Court. Respondent has withheld its consent, thus necessitating the filing of this motion.

The United Kingdom seeks leave to file its brief *amicus curiae* because it has a substantial interest in expressing its views to the Court regarding the need to correct the decision of the court below. The question before this Court – whether corporations formed under the laws of the United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage diversity jurisdiction – directly implicates how the United Kingdom, under its own laws, views the nationality of such corporations. The United Kingdom is particularly concerned in this regard because the decision below followed a prior Second Circuit decision that misinterpreted United Kingdom law.

The United Kingdom also is concerned that the decision below may jeopardize current and future commercial dealings between corporations of its Overseas Territories and American companies. Denying Overseas Territories corporations access to United States federal courts undermines countless transactions that rely on federal jurisdiction to provide stability and certainty in

the event problems arise regarding those transactions. The resulting uncertainty may lead to fewer business opportunities between American and Overseas Territories corporations and a consequent economic impact that may be measured in the billions of dollars.

For these reasons, the Government of the United Kingdom of Great Britain and Northern Ireland respectfully requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

MARK N. BRAVIN
Counsel of Record
PETER BUSCEMI
DAVID R. LIPSON
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7231

Attorneys for the Government of the United Kingdom of Great Britain and Northern Ireland

November 21, 2001

QUESTION PRESENTED

Whether corporations organized under the laws of the British Virgin Islands and other United Kingdom Overseas Territories qualify as "citizens or subjects of a foreign state" under the federal alienage diversity jurisdiction statute, 28 U.S.C. § 1332(a)(2).

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF i

QUESTION PRESENTED iii

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST 2

BACKGROUND 4

ARGUMENT 9

I. THE SECOND CIRCUIT'S DENIAL OF ALIENAGE JURISDICTION IN CASES INVOLVING OVERSEAS TERRITORIES CORPORATIONS THREATENS SIGNIFICANT HARM TO UNITED STATES AND UNITED KINGDOM COMMERCIAL INTERESTS THAT EXTENDS FAR BEYOND THIS CASE 10

II. THE SECOND CIRCUIT'S DENIAL OF ALIENAGE JURISDICTION OVER OVERSEAS TERRITORIES CORPORATIONS HAS CREATED THE VERY SORT OF "FOREIGN ENTANGLEMENT" THAT ALIENAGE JURISDICTION WAS DESIGNED TO AVOID 12

III. PRINCIPLES OF INTERNATIONAL COMITY FAVOR CONSIDERATION OF THE UNITED KINGDOM'S POSITION REGARDING ITS OWN LAW AND CORRECTION OF THE SECOND CIRCUIT'S ERROR IN *MATIMAK*. 14

CONCLUSION 16

APPENDIX 1a

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
ART 57 Properties, Inc. v. 57 BB Property, L.L.C., No. 99-10385 (5th Cir. 2000)	7
Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc., 917 F.2d 78 (7th Cir. 1990)	4 - 5
Cohn v. Rosenfeld, 733 F.2d 625 (9th Cir. 1984)	5
Favour Mind Ltd. v. Pacific Shores, Inc., No. 98-Civ-7038(SAS), 1999 U.S. Dist. LEXIS 18887, at *16 (S.D.N.Y. Dec. 7, 1999)	5
Hilton v. Guyot, 159 U.S. 113 (1895)	14
III Finance Ltd. v. Aegis Consumer Finance, Inc., No. 00-7016 (2d Cir. 2000)	6, 7
In re Maxwell Communication Corp., 93 F.3d 1036 (2d Cir. 1996)	14
In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992)	15
Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp., 655 F. Supp. 1275 (S.D.N.Y.), *aff'd*, 868 F.2d 1267 (2d Cir. 1988)	12
Iwanowa v. Ford Motor Co., 67 F.2d 424 (D. N.J. 1999)	15

TABLE OF AUTHORITIES — Continued

	Page
Koehler v. Bank of Bermuda (New York) Ltd., 209 F.3d 130 (2d Cir.), *amended*, 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000)	7-8, 12, 13
Matimak Trading Co. v. Khalily, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998)	passim
Murarka v. Bachrack Bros., 215 F.2d 547 (2d Cir. 1954)	4
Pan Eastern Exploration Co. v. Hufo Oils, 798 F.2d 837 (5th Cir. 1986)	16
Puerto Rico v. Russell & Co., 288 U.S. 476 (1933)	5
Sadat v. Mertes, 615 F.2d 1176 (7th Cir. 1980)	4, 13
Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410 (3d Cir. 1999)	16
United States ex rel. Saroop v. Garcia, 109 F.3d 165 (3d Cir. 1997)	15
United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986)	16
United States v. Wong Kim Ark, 169 U.S. 649, (1898)	4

TABLE OF AUTHORITIES — Continued

Page

Universal Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 224 F.3d 139 (2d Cir. 2000) 9

Wilson v. Humphreys (Cayman) Ltd., 916 F.2d 1239 (7th Cir. 1990)..... 14

STATUTES

28 U.S.C. § 1332(a)(2)..... 4, 5, 6

OTHER

AMS GROUP OFFSHORE NEWSLETTER (2000): "BRITISH VIRGIN ISLANDS: MORE THAN JUST IBC's," *available at* http://www.amsbvi.com/149BVImorethan ibcs.htm (last visited Nov. 15, 2001) 10

Consular Convention Between The United States and the United Kingdom, June 6, 1951, Art. 2, Sec. (4), 3 U.S.T. 3426, T.I.A.S. No. 2494, 3428 (1952) 7, 14-15

Rule 1(b), Rules Applying To International Claims, 7 Diplomatic Service Procedure Manual, Annex 1 (Mar. 1996)..... 6, 14

TABLE OF AUTHORITIES — Continued

Page

THE WORLD FACTBOOK 2001: CAYMAN ISLANDS, *available at* http://www.cia.gov/cia/ publications/ factbook/geos/cj.html (last visited Nov. 15, 2001) 10

U.S. CENSUS BUREAU, STATISTICS (2000), *available at* http://www.census.gov/foreign trade/sitcl/ 2000.htm (last visited Nov. 15, 2001) 11

U.S. CENSUS BUREAU FOREIGN TRADE STATISTICS (2000): "TOP TEN COUNTRIES WITH WHICH THE U.S. TRADES," *available at* http:/www.census.gov/foreigntrade/top/ dst/2000/12/balance/html (last visited Nov. 19, 2001) 11

UNITED STATES EMBASSY, TOKYO: "FOREIGN DIRECT INVESTMENT IN U.S. INCREASES 17 Percent in 2000," *available at* http://usembassy.state.gov/tokyo/www.heco 111.html; last visited Nov. 19, 2001) 11

13B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3604 (2d ed. 1984)..... 4

APPENDIX: Diplomatic Note No. 90/2001 from the Embassy of the United Kingdom to the United States Department of State (Oct. 5, 2001) 3, 15-16

IN THE

Supreme Court of the United States

OCTOBER TERM 2001

No. 01-651

THE CHASE MANHATTAN BANK, AS INDENTURE TRUSTEE, UNDER THE INDENTURE, DATED AS OF MAY 6, 1998,
Petitioner,

v.

TRAFFIC STREAM (BVI) INFRASTRUCTURE LIMITED,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Government of the United Kingdom of Great Britain and Northern Ireland submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed on behalf of the Chase Manhattan Bank.[1]

---

[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the United Kingdom or its counsel has made a monetary contribution to the brief's preparation and submission.

INTEREST OF THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The United Kingdom has a substantial interest in expressing its views to the Court regarding the need to correct the decision of the court below. The question before the Court – whether corporations formed under the laws of the United Kingdom Overseas Territories are "citizens or subjects" of the United Kingdom for purposes of alienage diversity jurisdiction – directly implicates how the United Kingdom, under its own laws, views the nationality of such corporations.[2] The United Kingdom has a special interest in participating in this matter because the decision below perpetuated a prior misinterpretation of United Kingdom law by the same court in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998).

The United Kingdom also is concerned that the decision below, if permitted to stand, will result in hundreds of thousands of Overseas Territories corporations – all of which the United Kingdom considers its subjects – being denied access to the jurisdiction of United States federal courts. Placing those corporations beyond the reach of federal jurisdiction – particularly in New York, the commercial center in the United States for international transactions – jeopardizes the stability of commercial dealings between

---

[2] The "United Kingdom," in the community of sovereign states, includes the United Kingdom Overseas Territories and the Crown Dependencies. The Overseas Territories include: Anguilla, Bermuda, the British Antarctic Territory, the British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the Sovereign Base Areas in Cyprus, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena and dependencies, South Georgia and the South Sandwich Islands, and the Turks and Caicos Islands. The Crown Dependencies consist of the Channel Islands and the Isle of Man.

those corporations and their American trading partners. It places at risk billions of dollars of existing financial commitments of such parties, and threatens the viability of future investment and commerce. This, in turn, could damage the commercial relations between the United States and the United Kingdom on a more global scale.

Her Majesty's Government expressed its concern about this issue in a recent Diplomatic Note requesting assistance from the United States Department of State in obtaining a reversal of *Matimak*. That Diplomatic Note sets forth the United Kingdom's position in unmistakable terms:

> The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship between the United States and the United Kingdom Overseas Territories.
>
> * * * * *
>
> In view of the proliferation of Second Circuit decisions enforcing the holding in *Matimak*, the United Kingdom considers it essential that the Supreme Court take this opportunity to remove the ensuing legal uncertainty concerning the transactions of corporations of United Kingdom Overseas Territories.

App. 1a-2a (Diplomatic Note No. 90/2001 (Oct. 5, 2001)).

BACKGROUND

As this Court explained more than 100 years ago in *United States v. Wong Kim Ark*, "it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship." 169 U.S. 649, 668 (1898). Both courts and commentators have recognized this fundamental principle. *See, e.g., Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547, 553 (2d Cir. 1954) ("It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations."); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3604, at 393 (2d ed. 1984) ("Of course, each nation has the absolute right to decide who is entitled to its citizenship.") (*citing Wong Kim Ark*, 169 U.S. at 668). Thus, "[t]he generally accepted test for determining whether a person is a foreign citizen for purposes of 28 U.S.C. § 1332(a)(2) is whether the country in which citizenship is claimed would so recognize him." *Sadat v. Mertes*, 615 F.2d 1176, 1183 (7th Cir. 1980).

Federal courts, therefore, look consistently to the law of the country whose citizenship is claimed when determining the existence of alienage diversity jurisdiction. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 285 (7th Cir. 1990), for example, the Seventh Circuit held that the Church of Cyprus met the requirements for alienage diversity jurisdiction because it was a "distinct juridical entity" under Cypriot law. The court of appeals rejected the argument that the Church was not a "corporation" within the American legal definition of the term, emphasizing that Cypriot law controlled the issue, and that "under the laws of the Republic of Cyprus, the Church is considered a juridical

entity distinct from its members." *Id.* Similarly, in *Cohn v. Rosenfeld*, 733 F.2d 625, 629 (9th Cir. 1984), the Ninth Circuit looked to Liechtenstein law when holding that alienage diversity jurisdiction extended to a Liechtenstein limited liability company known as an *anstalt*:

> Section 1332(a)(2) applies to foreign legal entities of all kinds, so long as the entity is considered a juridical person under the law that created it. . . . We have no doubt that Liechtenstein regards *anstalts* as juridical persons under its laws.

Id. Cf. Puerto Rico v. Russell & Co., 288 U.S. 476, 481 (1933) (looking to the law of Puerto Rico to determine that a Puerto Rican business entity known as a *sociedad en comandita* is a "juridicial person" for purposes of federal jurisdiction). Even the Second Circuit in *Matimak* recognized "the truism that a foreign state is entitled to define who are its citizens or subjects" when it attempted to interpret United Kingdom law with regard to the alienage jurisdiction issue in that case. 118 F.3d at 85.

In *Matimak*, however, the Second Circuit misinterpreted United Kingdom law and erroneously concluded that Hong Kong corporations were "stateless" entities not covered by the alienage jurisdiction statute. 118 F.3d at 86. That holding clashes directly with the United Kingdom's official position that Overseas Territories corporations are United Kingdom "subjects" within the meaning of 28 U.S.C. § 1332(a)(2).

The Second Circuit did not have the benefit of the United Kingdom's views on this matter when it decided *Matimak*. *See Favour Mind Ltd. v. Pacific Shores, Inc.*, No. 98-Civ-7038(SAS), 1999 U.S. Dist. LEXIS 18887, at *16 (S.D.N.Y. Dec. 7, 1999) ("[In *Matimak*,] the Second Circuit had before it no affirmative evidence that the government of Great Britain considered Hong Kong corporations to be British citizens."). But since that decision, Her Majesty's

Government has submitted its views on several occasions, seeking to facilitate correction of the court of appeals' error. These efforts include the filing of an *amicus curiae* brief in support of the petition for certiorari in *Matimak* itself, as well as several *amicus* submissions addressing the alienage jurisdiction question in subsequent cases involving Overseas Territories.

In February 2000, for example, the United Kingdom filed an *amicus curiae* brief in the Second Circuit in support of the appellee in *III Finance Ltd. v. Aegis Consumer Finance, Inc.*, No. 00-7016 (2d Cir. 2000), a case that involved alienage jurisdiction over a Cayman Islands corporation. That *amicus* submission set forth the United Kingdom's position that Overseas Territories corporations are United Kingdom "subjects" and thus should be allowed access to United States federal courts under 28 U.S.C. § 1332(a)(2). Specifically, the United Kingdom explained, *inter alia*, that:

- The United Kingdom's Rules Applying to International Claims, contained in the United Kingdom Government's Diplomatic Service Procedure Manual, define the term "United Kingdom national" to encompass "[c]ompanies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible;"

- The Companies Act 1948, on which the *Matimak* panel relied, and the subsequent Companies Act 1985, do not limit the United Kingdom from extending its sovereignty to corporations organized under the laws of the Overseas Territories;

- The *Matimak* panel relied on an inapposite statute when it looked to the British Nationality Act 1981 because, as the *Matimak* court admitted, that statute

applies only to natural persons and not corporations; and

- *Matimak* conflicts with Art. 2, Sec. (4) of the Consular Convention between the United States and the United Kingdom, June 6, 1951, 3 U.S.T. 3426, which defines United Kingdom "nationals" to include "all citizens of the United Kingdom and colonies, . . . and all British protected persons belonging to territories of His Majesty to which the Convention applies, including, where the context permits, all juridical entities duly created under the law of any of those territories."

No. 00-7016 (2d Cir. 2000), *amicus* brief at 6-7, 10-17.

The United Kingdom also attached to its brief in *III Finance* an earlier Diplomatic Note to the United States Government expressing its concerns. That Diplomatic Note, like the current one, expressly set forth the United Kingdom's official view "that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom." Diplomatic Note No. 13/2000 (Feb. 2, 2000). The parties in *III Finance* settled their case before the court of appeals could revisit its prior ruling in *Matimak* on alienage jurisdiction over claims involving Overseas Territories corporations. Also in February 2000, the United Kingdom filed a similar *amicus curiae* brief in the Fifth Circuit in *ART 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5th Cir. 2000). Like the Second Circuit in *III Finance*, however, the Fifth Circuit never reached the alienage jurisdiction issue, as the parties in *ART 57* stipulated to the withdrawal of alienage jurisdiction as an issue in the appeal.

The United Kingdom's position in *III Finance* also was presented to the entire Second Circuit in submissions by the parties regarding a petition for rehearing *en banc* in *Koehler v. Bank of Bermuda (New York) Ltd.*, another decision

denying alienage jurisdiction over an Overseas Territory corporation. 209 F.3d 130 (2d Cir.), *amended*, 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000). Relying in large part on the United Kingdom's position and arguments, three judges of the court of appeals dissented from the denial of that petition, and indicated that they would reverse *Matimak*. *Koehler*, 229 F.3d 187 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*); *id.* at 194 (Calabresi, J., dissenting from denial of rehearing *en banc*). Indeed, two of those judges expressly requested review of the alienage jurisdiction issue by this Court:

> Because [the *Matimak* and *Koehler*] panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

Id. at 193-94 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*). In addition, two of the three judges on the *Koehler* panel – Judges Cardamone and Newman – stated that "[w]ere the question open in this Circuit, [they] would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute . . . ." *Koehler*, 229 F.3d at 424. Because of the Second Circuit's prior holding in *Matimak*, however, they felt "constrained" to hold that jurisdiction was lacking. *Id.*

Counsel for petitioner in this case resubmitted to the Second Circuit the views and materials that the United Kingdom had presented in *III Finance*. The panel below, however, followed *Matimak* and dismissed the case for lack of alienage jurisdiction. The panel did not conduct its own

analysis of the merits. Rather, it simply quoted from the court's prior decisions in *Matimak, Koehler, and Universal Reinsurance Co. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000), and concluded that it was "bound to hold" that alienage jurisdiction did not exist. Pet. App. 7a.

ARGUMENT

The decision below directly affects the commercial interests of countless American companies and their Overseas Territories trading partners, threatens a "foreign entanglement" with one of the United States' closest allies, and implicates fundamental principles of international comity.

The Second Circuit's denial of alienage jurisdiction in cases involving Overseas Territories corporations undermines the stability afforded by federal forum-selection clauses relied on by American and Overseas Territories companies. The resulting uncertainty will lead to fewer business opportunities between such entities, thereby conflicting with the fundamental purposes of alienage jurisdiction and threatening an economic impact that may be measured in the billions of dollars.

In addition, the Second Circuit's decisions in this area ignore the United Kingdom's views about the citizenship of its own subjects, and thus grant no deference to the United Kingdom's statements regarding the reach of its own sovereign law. The United Kingdom's official position, as expressed in its rules, treaties, two Diplomatic Notes, and numerous submissions to United States courts, is that corporations of its Overseas Territories are United Kingdom "subjects" for purposes of alienage jurisdiction. This determination deserves deference under fundamental principles of international comity, particularly considering

that United Kingdom courts are open to corporations of United States territories. Yet the panel below essentially disregarded the United Kingdom's view, and thus created just the sort of "foreign entanglement" that alienage jurisdiction was designed to avoid.

I. THE SECOND CIRCUIT'S DENIAL OF ALIENAGE JURISDICTION IN CASES INVOLVING OVERSEAS TERRITORIES CORPORATIONS THREATENS SIGNIFICANT HARM TO UNITED STATES AND UNITED KINGDOM COMMERCIAL INTERESTS THAT EXTENDS FAR BEYOND THIS CASE.

The Second Circuit's decisions in *Matimak* and the case at bar will harm the interests of hundreds of thousands of corporations formed in the United Kingdom Overseas Territories, as well as the countless American companies and individuals that transact business with them on a daily basis. Almost 500,000 international business companies have been incorporated in the British Virgin Islands since 1984. *See* AMS GROUP OFFSHORE NEWSLETTER (2000): "BRITISH VIRGIN ISLANDS: MORE THAN JUST IBC'S," *available at* http://www.amsbvi.com/I49BVImorethanibcs.htm (last visited Nov. 15, 2001). Similarly, the Cayman Islands, another United Kingdom Overseas Territory and home to more than 40,000 companies, is "the fifth largest financial center in the world." *See* THE WORLD FACTBOOK 2001: CAYMAN ISLANDS, *available at* http://www.cia.gov/cia/publications/factbook/geos/cj.html (last visited Nov. 15, 2001).

The denial of federal alienage jurisdiction in cases involving such parties will have a substantial economic impact on commerce between the United States and the Overseas Territories, and more generally on bilateral investment and commerce between the United States and

United Kingdom. In 2000 alone, for example, United States exports to the British Virgin Islands, the Cayman Islands, and Bermuda totaled $64.6 million, $354 million, and $428 million, respectively; imports into the United States from those same Overseas Territories totaled $30.9 million, $6.5 million, and $39 million, respectively, in the same year. *See* U.S. CENSUS BUREAU, STATISTICS, (2000) at http://www.census. gov/foreign-trade/sitcl/2000.htm (last visited Nov. 15, 2001). The United Kingdom (including the Overseas Territories) is the largest source of foreign investment in the United States, and one of this nation's largest trading partners. *See* U.S. CENSUS BUREAU FOREIGN TRADE STATISTICS (2000): "TOP TEN COUNTRIES WITH WHICH THE U.S. TRADES," *available at* http:/www.census.gov/foreigntrade/top/dst/2000/12/balance/html (last visited Nov. 19, 2001); UNITED STATES EMBASSY, TOKYO: "FOREIGN DIRECT INVESTMENT IN U.S. INCREASES 17 PERCENT IN 2000," *available at* http://usembassy.state.gov/tokyo/www.heco111.html (last visited Nov. 19, 2001).

Access to federal courts provides stability and certainty for such transactions between American and Overseas Territories entities. It is critical for Overseas Territories corporations to know, when considering transactions with an American company, that they will be able to seek redress in federal court if problems arise with those transactions. Many United Kingdom Overseas Territories corporations will be less willing to do business in the United States due to the uncertainty created by the Second Circuit's decisions.[3] That, in turn, will hamper the ability of American companies to conduct business with Overseas Territories companies. The Second Circuit's ruling thus needlessly frustrates legitimate

---

[3] As explained in Petitioner's brief, *Matimak* conflicts with several other courts of appeals decisions holding that alienage jurisdiction extends to Overseas Territories corporations. *See* Petition at 9-11.

business interests on a massive scale. This problem is especially acute because New York is the traditional financial center of the United States, and many commercial contracts between such parties call for a forum in New York.

Denying Overseas Territories corporations access to United States federal courts thus conflicts directly with one of the basic purposes of alienage jurisdiction: the promotion of foreign investment and trade with the United States.

> Alienage jurisdiction was established . . . to strengthen our relations – particularly our commercial relations – with foreign nations. The importance of these goals has only increased with time as both international relations and global trade have become more complex and our nation has assumed a central role in both.

Koehler, 229 F.3d at 193 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*). The decision below threatens ongoing harm to the financial and investment activities between citizens of the United States and subjects of the United Kingdom. To avoid that unnecessary result, this Court should grant *certiorari*, correct the Second Circuit's misreading of United Kingdom law, and reverse the lower court's decision.

II. THE SECOND CIRCUIT'S DENIAL OF ALIENAGE JURISDICTION OVER OVERSEAS TERRITORIES CORPORATIONS HAS CREATED THE VERY SORT OF "FOREIGN ENTANGLEMENT" THAT ALIENAGE JURISDICTION WAS DESIGNED TO AVOID.

"The *raison d'être* of alienage jurisdiction is to avoid 'entanglements with other sovereigns that might ensue from failure to treat the legal controversies of aliens on a national level.'" *Matimak*, 118 F.3d at 82 (*quoting Iran Handicraft & Carpet Exp. Ctr. v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y.), *aff'd* 868 F.2d 1267 (2d Cir. 1988)). *See also Sadat v. Mertes*, 615 F.2d at 1186 (discussing "paramount purpose of the alienage jurisdiction provision to avoid offense to foreign nations because of the possible appearance of injustice to their citizens"). The Second Circuit attempted to defend its denial of jurisdiction by labeling the corporation at issue "stateless" and summarily concluding that "there is no danger of foreign entanglements, as there is no sovereign with whom the United State[s] could . . . become entangled." 118 F.3d at 87. But, of course, this assertion is circular and assumes the answer to the question at issue. The United Kingdom's strong reaction to *Matimak* and its progeny – including the submission of the instant motion and *amicus* brief regarding its view of the citizenship of Overseas Territories corporations – belies the Second Circuit's conclusion. As Judge Sotomayor explained in dissent from the denial of rehearing *en banc* in *Koehler*:

> Whatever other intention the panels here and in *Matimak* may have had, there can be no doubt that the fundamental purpose of alienage jurisdiction – to [a]void offense to foreign nations – is frustrated by the *Matimak* decision and its further application by this panel. Paradoxically, the country we offend by these holdings [the United Kingdom] is not only a strong ally, but the very country the drafters of the alienage jurisdiction provision had in mind more than two hundred years ago when they sought to open the federal courts to foreign litigants.

Koehler, 229 F.3d at 188-89 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing *en banc*).

The United Kingdom's numerous *amicus* submissions to the Second Circuit and other courts, its Diplomatic Notes, and this brief all demonstrate the United Kingdom's deep concern over the denial of alienage jurisdiction to Overseas Territories corporations. Her Majesty's Government thus is

very much "entangled" with the United States over this issue. *See Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1243 (7th Cir. 1990) ("Certainly, the exercise of American judicial authority over the citizens of a British Dependent Territory implicates this country's relationship with the United Kingdom – precisely the *raison d'être* for applying alienage jurisdiction.").

III. PRINCIPLES OF INTERNATIONAL COMITY FAVOR CONSIDERATION OF THE UNITED KINGDOM'S POSITION REGARDING ITS OWN LAW AND CORRECTION OF THE SECOND CIRCUIT'S ERROR IN *MATIMAK*.

As a matter of international comity, the Second Circuit should have deferred to the United Kingdom's official position that its Overseas Territories corporations are United Kingdom subjects. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). *See also In re Maxwell Communication Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996) ("Comity is a doctrine that takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law."). The Government of the United Kingdom has determined that its sovereignty extends over corporations of its Overseas Territories.

The United Kingdom's Rules Applying to International Claims expressly define the term "United Kingdom national" to include "[c]ompanies incorporated under the law of the United Kingdom or any territory for which the United Kingdom is internationally responsible." Rule 1(b), Rules Applying to International Claims, 7 Diplomatic Service Procedure Manual, Annex 1 (Mar. 1996). Similarly, the Consular Convention between the United States and the

United Kingdom defines United Kingdom "nationals" to include "all juridical entities duly created under the law of any of [the Overseas Territories]." Consular Convention, at Art. 2, Sec. (4), 3 U.S.T. 3426.

These official statements by the United Kingdom regarding the reach of its own sovereign law deserve deference. *See, e.g., In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law."); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 490 (D.N.J. 1999) ("Although courts are not bound by a foreign government's pronouncement of which claims are cognizable, the principles of international comity dictate that a court not interfere with a foreign sovereign's pronouncement of its law."). The Consular Convention merits additional deference because it also constitutes an express recognition by the United States of the United Kingdom's sovereignty over its Overseas Territories corporations. *See United States ex rel. Saroop v. Garcia*, 109 F.3d 165, 170 (3d Cir. 1997) (extension of comity in deferring to foreign construction of treaty furthers United States interests where United States recognizes treaty as binding itself and foreign nation).

Considerations of reciprocity also favor deferring to the United Kingdom's construction of its own law. As the Diplomatic Note explains,

> The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

App. 2a (Diplomatic Note No. 90/2001 (Oct. 5, 2001)).

In light of these principles of international comity and reciprocity, the Second Circuit should have deferred to the United Kingdom's official position that its Overseas Territories corporations are United Kingdom "subjects" within the meaning of 28 U.S.C. § 1332(a)(2). *Cf. Pan Eastern Exploration Co. v. Hufo Oils*, 798 F.2d 837, 839 (5th Cir. 1986) ("Comity is not a binding obligation, but a discretionary decision that deference will best promote the mutual interests of the United States and the foreign sovereign."). The Second Circuit's failure to afford such deference constitutes an additional reason for granting *certiorari* and correcting the erroneous *Matimak* decision.

The Second Circuit has refused to distinguish *Matimak* in subsequent cases, and it has declined (over dissent) to reconsider its position *en banc*. As a consequence, review by this Court is the sole vehicle by which the court of appeals' repeated error can be corrected. *See, e.g., United States v. Ianniello,* 808 F.2d 184, 190 (2d Cir. 1986) ("This Court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this Court *en banc*."). The Second Circuit has even refused to accept the views of the United States, which consistently has taken the position that Overseas Territories corporations are United Kingdom subjects within the meaning of the statute. *See, e.g., Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 417-18 (3d Cir. 1999). Unless this Court grants review and clarifies the proper scope of alienage jurisdiction, the problems created by *Matimak* and its progeny will continue to multiply. *See* Petition at 22-23 n. 11 (discussing recent decisions within the Second Circuit dismissing actions involving Overseas Territories corporations). Her Majesty's Government therefore respectfully requests that this Court grant *certiorari* and address this important issue.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MARK N. BRAVIN
Counsel of Record
PETER BUSCEMI
DAVID R. LIPSON
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7231

Attorneys for
Amicus Curiae The Government of the United Kingdom of Great Britain and Northern Ireland

November 21, 2001

APPENDIX

APPENDIX - DIPLOMATIC NOTE FROM THE EMBASSY OF THE UNITED KINGDOM TO THE UNITED STATES DEPARTMENT OF STATE

Note No. 90/2001

Her Britannic Majesty's Embassy presents its compliments to the U.S. Department of State and wishes to reiterate its concern, expressed in its Note No. 13/2000 of 2 February 2000, about a number of judicial decisions which have denied corporations of United Kingdom Overseas Territories access to United States Federal Courts.

The initial decision in question is that of the United States Court of Appeals for the Second Circuit in *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998). The court in that case held that a Hong Kong corporation was not a "citizen" or "subject" of a "foreign state" and thus did not fall within the scope of federal alienage diversity jurisdiction under 28 U.S.C. § 1332(a)(2). The United Kingdom believes that *Matimak* was wrongly decided, primarily because it was based on an incorrect interpretation of United Kingdom company and nationality law, as well as on a misapprehension of the constitutional relationship between the United Kingdom and its Overseas Territories. Subsequent decisions have underlined the need for review and reversal of the erroneous *Matimak* decision (see annex).

The United Kingdom wishes to restate its position that corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom. The United Kingdom is therefore of the view that such corporations ought to be amenable to the alienage jurisdiction of United States Federal Courts under 28 U.S.C. § 1332(a)(2), whether as plaintiffs or defendants. Court decisions which fail to recognise such jurisdiction may have a serious detrimental effect on the trading relationship

between the United States and the United Kingdom Overseas Territories.

The United Kingdom notes that all corporations validly incorporated under the laws of the United States and its territories are entitled to sue and be sued in the courts of the United Kingdom and its Overseas Territories. As a matter of international comity and reciprocity, the United Kingdom considers that United States Federal Courts should be open to corporations established in United Kingdom Overseas Territories.

The United Kingdom notes that Chase Manhattan has communicated its intention to seek from the US Supreme Court a writ of certiorari in relation to the decision in its case by the Court of Appeals for the Second Circuit. In view of the proliferation of Second Circuit decisions enforcing the holding in *Matimak*, the United Kingdom considers it essential that the Supreme Court take this opportunity to remove the ensuing legal uncertainty concerning the transactions of corporations of United Kingdom Overseas Territories. The United Kingdom therefore intends to file a Brief *amicus curiae* to the Supreme Court in support of Chase Manhattan's application.

The United Kingdom continues to appreciate the very helpful efforts of the United States Government in submitting Briefs *amicus curiae* to United States courts on these matters which support the United Kingdom's position. In view of the opportunity presented by Chase Manhattan's application to resolve this matter definitively, the United Kingdom expresses its firm desire that the United States Government intervene in like fashion at the petition stage of this case.

Her Britannic Majesty's Embassy avails itself of this opportunity to renew to the U.S. Department of State the assurances of its highest consideration.

ANNEX

Since *Matimak*, the Second Circuit has applied its flawed reasoning to a series of subsequent cases involving corporations of UK Overseas Territories, including *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130 (2d Cir.), *amended*, 229 F.3d 424 (2d Cir.), *reh'g en banc denied*, 229 F.3d 187 (2d Cir. 2000); *Universal Reinsurance Co., Ltd. v. St. Paul Fire & Marine Insurance Co.*, 224 F.3d 139 (2d Cir. 2000), and, most recently, *The Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Limited*, 251 F.3d 334 (2d Cir. 2001).

The United Kingdom expressed its views to the Second Circuit in yet another case that involved the same issue, *III Finance Ltd. v. The Aegis Consumer Finance, Inc.*, No. 00-7016 (2d Cir. 2000). That case, however, settled before the court could address the issue of alienage diversity jurisdiction. Thereafter, in connection with the petition for rehearing en banc in *Koehler*, the views and materials that the United Kingdom submitted in *III Finance* were considered by the entire Second Circuit. Three judges voted to rehear the case en banc. See 229 F.3d 187 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing en banc); *id.* at 194 (Calabresi, J., dissenting from denial of rehearing en banc). Indeed, at least two of those judges expressly called for Supreme Court review of the issue:

> Because these panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

Id. at 193-94 (Sotomayor, J., joined by Leval, J., dissenting from denial of rehearing en banc).

More recently, in *Chase Manhattan Bank*, counsel for Chase resubmitted the information that the United Kingdom had presented in *III Finance*, but the panel nevertheless felt constrained to follow the earlier decision in *Matimak*.

These recent Second Circuit decisions stand in marked contrast to the holdings of other federal courts of appeals that have rejected, or independently reached a conclusion opposite from, the holding in *Matimak*. See, e.g., *Southern Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 412-19 (3d Cir. 1999); *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242-43 (7th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991).